

In The Matter Of:
Right-of-Way on Indian Land

October 27, 2014
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BUREAU OF INDIAN AFFAIRS

PROPOSED RULE

RIGHTS-OF-WAY ON INDIAN LAND

RIGHTS-OF-WAY CONSULTATION

OCTOBER 27, 2014
HYATT REGENCY,
THE LEARNING CENTER CONFERENCE ROOM
6:00pm - 8:00pm

P A N E L I S T S & P R E S E N T E R S

Kevin Washburn,
Assistant Secretary - Indian Affairs

Stephen Simpson,
Senior Attorney, Office of the Solicitor

Mike Black,
Director, Bureau of Indian Affairs

Larry Roberts,
Principal Deputy Assistant Secretary - Indian Affairs

Elizabeth Appel,
Director - Regulatory Affairs & Collaborative Action

Legend of the transcript:

[sic] Exactly as said

[phonetic] Exact spelling unknown

-- Break in speech continuity

... Trailing speech or omission when reading
written material

[inaudible] Mechanical or speaker failure

P R O C E E D I N G S

6:14 PM

KEVIN WASHBURN: This is the real hardcore crowd willing to spend their dinner hour talking bout Right-of-Way regs. We're really grateful to all of you for being here. We have a lot of staff here. And let me sort of with quickly recognizing them. Mike Black who is abandoning us all of a sudden. Steve Simpson here from his sister job. He's worked really hard on these regulations. Liz Appel from our RACA, our Regulatory Affairs and Collaborative Action office; she's in charge of all of our rule-making efforts and does a great job. Andrea Bledsoe-Downs, our Deputy Assistant Secretary for Policy and Product Development. Sara Harris, our Chief of Staff. Principal Deputy Assistant Secretary, Larry Roberts. Sara Walters in the back. Darin Meeks who runs our Congressional Affairs Office. Did I miss anybody? We've got you surrounded. We may have you almost outnumbered, basically.

This regulation, for most people it's not exactly a riveting subject matter, but those of you who are here, I think, know that it's exceedingly important because tribes get a lot of revenues from their Right-of-Ways. It's a major source of economic development, especially for Western tribes. We have enacted our current Right-of-Way

1 regulations more than 40 years ago, in 1968. We haven't
2 updated them in over 30 years -- so since 1980 -- and it
3 is time.

4 The updates that the proposed rule would provide for
5 Right-of-way processed tribal land, BIA will defer to the
6 tribe on it's land management decisions, including
7 decisions about how much compensation they should receive,
8 whether that compensation should be a periodic payment
9 over time or a one time upfront type payment, and what's
10 the form of compensation. Should it be monetary
11 compensation or payments in kind? These revisions are
12 really important for codifying tribal sovereignty and the
13 Rights-of-Way area. We've made a lot of progress. We've
14 had great success with our leasing regulations, our 162
15 regulations. Building on that success we are making some
16 significant improvements there. We would like to make
17 similar improvements to our Right-of-Way regulations.

18 This is a priority because economic development is
19 such a priority. We all know the tribes Indian in country
20 will do a lot better if we can increase economic
21 development on tribal lands. Economic development is not
22 just a lease, but it may require easements for
23 infrastructures such as roads and utility lines. Some of
24 our tribes are located in key locations where that
25 infrastructure is important to off the reservation as

1 well. So that can be a purposed source of revenue.

2 We published the rule, the proposed rule in July, and
3 so far we have received input from tribes, allottees, and
4 industry. Today we got Pueblo Governor Chevarria's
5 comments. We've hosted three tribal consultation
6 sessions, already, prior to this one. We are really
7 needing to hear from you. This proposed rule is a work in
8 progress. We are here to provide a brief overview of the
9 proposed rule and most of all we are here to listen to you
10 and get your comments, your oral comments, on the rule.

11 So we want your land to be as productive as you want
12 it to be and we need your input to help us make that
13 happen with our Right-of-Way Regulations. Would anyone
14 else like to say anything before I turn it over to Liz
15 Appel to run through a quick PowerPoint to show you what
16 we have in mind? Take it away, Liz.

17 LIZ APPEL: Thank you, Kevin. The slides -- there
18 are copies in the back if you didn't pick one up, they're
19 back there. There are also copies of the Rules back there
20 and a sheet that is kind of a summary of what the proposed
21 rule would do. Since we have limited time today, I'm
22 going to run through these slides pretty quickly. I'm
23 going to try to, anyway, to make sure that you have as
24 much time as possible to provide your input.

25 As Kevin mentioned these are just proposed, they are

1 not final by any means. So we really need your input if
2 there are pieces that you like or don't like about the
3 proposed rule.

4 Kevin provided some background about how these came
5 about. Initially, we revised the leasing regulations and
6 as you'll see these Rights-Of-Way regulations take a lot
7 of the similar approaches that the revisions to the
8 residential business and wind and solar leasing
9 regulations do. The current Rights-of-Way regulations
10 were proposed back in the 60s and there were pieces of
11 them were updated over the years, but they haven't been
12 comprehensively updated and they haven't been updated at
13 all since 1980. So it's time that we took a look and
14 proposed this rule.

15 The current regulations also rely on statutory
16 authorities that are specific to different types of
17 Rights-of-Way. In the proposed rule, we're taking the
18 approach of relying on the general Rights-of-Way statutory
19 authority at 25 USC 323, 326, or 7, 8. Through this
20 approach we're trying to simplify the requirements rather
21 than having different requirements for different types of
22 Rights-of-Way. As I mentioned, the proposed rule
23 incorporates a lot of the approaches that the leasing
24 regulations take.

25 So I'm going to briefly run through each of the

1 subparts. Starting with the purpose and definitions. The
2 proposed definition adds several definitions in effort to
3 make the rule more clear and set out the processes and
4 terms more clearly. There are provisions on what land the
5 Rights-of-Way rule applies to, what happens if there is a
6 life estates on the land. Then there are amendments that
7 the general provisions that are in the new leasing
8 regulations are also in these Rights-of-Way regulations.
9 For example, what laws and what taxes apply when there's a
10 Right-of-Way across Indian land. Whether tribes may
11 contract or compact for Right-of-Way and what decisions
12 may be appealed and who's an interested party in those
13 appeals.

14 So Subpart B sets up the process for obtaining a
15 Right-of-Way. One of the biggest changes is that under
16 the proposed rule, there would be no BIA approval required
17 to survey the land. So currently, it's sort of a two-step
18 BIA approval process. The Right-of-Way applicant would
19 have to first get approval from the survey and then submit
20 the application for the actual Right-of-Way. This instead
21 would cutout that first BIA approval step, but the
22 applicant would still have to get the consent of the
23 landowners to get access to the property and survey.

24 The proposed rule also sets out what an application
25 must include and it sets out the consent requirements

1 basically for tribal land; tribal consent is always
2 required. For individually owned land, a consent of the
3 owners majority interest in the land is required. That
4 statutory provision that the majority interest ownership
5 is required. There are certain circumstances where BIA
6 can grant the Right-of-Way without the landowners consent;
7 this also is statutory. The owners are so numerous that
8 it would be impractical, there would be no substantial
9 injury to the land or the landowner. Landowners are
10 compensated, BIA provides a 30-day notice to all of the
11 owners. What's not statutory and what we're specifically
12 seeking comment on is our definition of what "So numerous"
13 means and the proposed rule defines "So numerous" to be 50
14 or more, but less than 100 owners, where no one owner
15 holds an interest greater than 10 percent, or 100 or more
16 co-owners. If that seems familiar, that's because it's
17 from the definition of highly fractionated in APRA. We
18 are specifically seeking comment on whether "So numerous"
19 should use that definition.

20 The proposed rule would instead of deposit require a
21 bond or alternative security that could be in the form of
22 a CD or a letter of credit, etc. That security would have
23 to cover the highest annual rent, unless it's a one-time
24 payment for the Right-of-Way. Estimated damages from
25 construction, operation maintenance, and restoration and

1 reclamation, and under certain circumstances, BIA can
2 waive that requirement for the security. The tribe
3 determines the waivers in it's best interest, BIA will
4 defer to the tribes determination. You'll see that
5 throughout the proposed rule that BIA is deferring to the
6 tribe, the tribes determination and the interest in
7 self-governing.

8 Likewise, for compensation, BIA is going to defer to
9 whatever the tribe determines to be the appropriate
10 compensation. For individually-owned land, generally,
11 market value is required, except in certain exceptions.
12 The proposed rules sets out specifics about when
13 compensation would be required, but it always defers to
14 the grant. So the parties can negotiate if they want
15 certain compensation requirements that can always be
16 included in the negotiated grant. The proposal will also
17 incorporate the same approach that the leasing regulations
18 take to direct pay limiting to when direct pay is
19 available to only those situations where there are 10 or
20 fewer landowners and they all agree to direct pay.

21 Reviews and adjustments generally, will not be
22 required for tribal land unless the tribe would like to
23 require them. For individually owned land, they are
24 required, unless the payments of one-time lump sum or one
25 of these other conditions.

1 The process for the Right-of-Way application. Once
2 an applicant submits a complete application package to
3 BIA, BIA will notify them that it is complete, if it's not
4 complete BIA will notify them and identify what the
5 missing information is. If it's complete, BIA will review
6 it and issue a decision within 60 days. So it's providing
7 some certainty with the Right-of-Way to help with economic
8 development processes. Just a note: As with the leasing
9 regulations, the 60-day clock for reviews starts only when
10 the package is complete, meaning all the consents have
11 been obtained, the NEPA, if any is required, has been done
12 and all of the evaluations have been done.

13 The proposed rule sets out limited grounds for BIA to
14 disapprove a Right-of-Way only if the consents haven't
15 been obtained or there's a compelling reason or other
16 requirements of the regulations haven't been met. That
17 also is to provide some sort of certainty that through the
18 application process, that a Right-of-Way will be granted
19 unless there are valid reasons for not approving that
20 Right-of-Way. And again, BIA is going to defer to maximum
21 extent possible to the Indian landowner's determination
22 that a Right-of-Way is in its best interest and BIA not
23 unreasonably withhold approval. BIA has the discretion to
24 grant one Right-of-Way for all tracts traversed by a
25 Right-of-Way. To use one grant for several tracts or to

1 issue separate grants for a Right-of-Way traversing
2 several tracts and that is made explicit in the proposal.

3 The grant is going to incorporate any restrictions or
4 conditions set out in the consents and that's with the
5 idea that it's more of a negotiation and will also list
6 the restrictions that are set out in the regulations. The
7 proposed rule provides -- it specifically addresses
8 piggybacking. It addresses when you can add a new use to
9 an existing Right-of-Way versus when you have to get a new
10 Right-of-Way grant for a new use. Basically, if the use
11 is specified in the original Right-of-Way grant, then you
12 don't need a new Right-of-Way or if the use is within the
13 same scope of the use that's in the original Right-of-Way
14 grant, then you will have to obtain a new Right-of-Way;
15 you could piggyback. The determination of whether the use
16 is in the same scope, is actually a legal determination.
17 But we welcome any comments, if you have any, on that
18 issue among everything else.

19 BIA will grant the new Right-of-Way for if the use is
20 not within the scope. If the new Right-of-Way does not
21 interfere with the use or purpose of the existing
22 Right-of-Way and the existing Right-of-Way grantee
23 consents.

24 Subparts C addresses the Right-of-Way term/duration.
25 What I really want to highlight here, BIA is going to

1 defer to the tribes determination what the appropriate
2 term would be. But for individually owned land, the
3 proposed rule has a table where it sets out various types
4 of Rights-of-Way and has suggested terms for those
5 Rights-of-Way. We particularly would like comment on
6 whether those terms are appropriate for the different
7 types of Rights-of-Way. So please pay special attention
8 to that.

9 Renewal. BIA will renew the original Right-of-Way
10 files. If there is a change in size, type, or location,
11 than a greater chance to get a new Right-of-Way; they
12 can't renew. The proposal sets out the process for
13 amendments, assignments, and mortgages, generally there
14 time limits for approving each of these. Again, the clock
15 starts only when the package is complete. The proposed
16 rules sets out the requirements for when approval is
17 appropriate or when those limited conditions when BIA can
18 disapprove one of those.

19 Effectiveness. The proposed rule sets out that the
20 Right-of-Way would be effective upon BIA approval. Even
21 if an appeal is filed, the Right-of-Way would be
22 immediately effective under the proposed rule. BIA will
23 refer Right-of-Way documents in the LTRO.

24 The compliance and enforcement provisions really
25 mirror those of the new leasing regulation. The BIA

1 basically, establishes when BIA will investigate for
2 compliance with a Right-of-Way and establish that BIA is
3 going to consult with the tribe on tribal land before
4 taking any enforcement action. It sets out if the
5 violation is one of other than nonpayment what the steps
6 are that BIA will take to enforce against that grantee and
7 if the failure is a failure to pay compensation and the
8 median time required by the grant what the steps are that
9 BIA will take. Then it sets of the process for canceling.

10 Something that's new is the proposed rule addresses
11 abandonment and non-use. Basically, it defines non-use as
12 if the grantee does not use the Right-of-Way for a
13 two-year period for the purpose for which a Right-of-Way
14 was granted. And an abandonment would be if the grantee
15 affirmatively relinquishes the Right-of-Way. In either
16 case, the BIA can cancel Right-of-Way within 30 days after
17 mailing notice to the grantee.

18 And then finally, the proposed rule addresses service
19 lines as a piece separate from the whole Right-of-Way
20 granting process. Service lines are defined as a utility
21 line that's supplying the occupants of the property with
22 utility service, basically. Unlike the current
23 regulation, the definition of service line in the proposed
24 rule does not have any capacity limitation for what
25 qualifies as a service line.

1 As I said, there's no Right-of-Way grant required for
2 service lines, but there are service line agreements
3 required that must be filed with the BIA. There's no BIA
4 approval, but parties have to file it with the BIA. The
5 BIA will record it in the LTRO so that there is a record
6 that that service line is in place.

7 So comments on the proposed rule are not due November
8 3rd. You can feel free to provide hard copy or e-mail.
9 This is the e-mail address: Consultation@bia.gov. You
10 can also comment through regulations.gov. Our next staff
11 search will be to review the comments, make changes that's
12 appropriate, and ultimately publish a final rule in the
13 Federal Register. Once the final rule is published, there
14 will be at least a 30-day period before that rule becomes
15 effective and that's to allow people time the to
16 familiarize themselves with the rule and comply with it.

17 That is the presentation. We can open it up now to
18 all of your comments and input. We have our esteemed
19 panel here to answer any questions you may have. So we
20 have a microphone that I will make sure is turned on. If
21 you want to come up to the microphone or if you want to
22 raise your hand, I'll bring to you.

23 KEVIN WASHBURN: We also have a court reporter, so
24 when you come up to the mic to make your comment, please
25 identify yourself so the court reporter can get your name

1 for the record. It's important to know who is here and
2 what they said. You deserve credit for the ideas you help
3 us with.

4 GARY HAYES: My name is Gary Hayes, Councilman from
5 the Ute Mountain Ute Tribe, we appreciate this
6 opportunity. As you go down this road, I think there are
7 other tribes in this situation. Back in the early 1900s
8 the WAPA lines -- we have WAPA lines crossing our
9 reservation today. As the responsibility, trustee
10 responsibility to the tribe, they agreed to have each line
11 perpetual agreements. Today we know that's wrong. As a
12 trustee back in those days, I think, they failed to
13 protect the tribe into these agreements. I guess my
14 question is -- you guys are attorneys -- to think what can
15 we do to undo the injustice that is it created today,
16 because it is wrong. Maybe our leaders didn't
17 understand -- I'm not trying to demean them or anything,
18 but it's the responsibility of the BIA to protect our
19 interest and not to agree to disagreement for perpetual.
20 I'm just throwing that out. Is there a way, a strategy,
21 that we can go forward with? I don't know if any other
22 tribes in Indian country face that same situation.

23 KEVIN WASHBURN: Thank you, Chairman Hayes, for that
24 comment. We certainly are open to all views. We want to
25 focus on the Rights-of-Way we have before you. We know

1 there's been a lot of injustices in the past. I have to
2 say that everything day at work seems like correcting
3 mistakes that our government's made in the past. We can't
4 correct all of the them in the past, but we can certainly
5 try to make things better going forward. So that's the
6 purpose of the consultation now to get these Rights-of-Way
7 regs to a place where tribes have much more control over
8 the Rights-of-Way on your reservation. We reserve that
9 discussion for another time about the Western Area Power
10 Authority Rights-of-Way. Thank you.

11 GARY HAYES: But with the proposal --

12 STEPHEN SIMPSON: I'm Steve Simpson the from the
13 Solicitor's office. As Kevin noted the proposal is to
14 deal with Rights-of-Way in the future. We do have a
15 proposed regulation we do note that certain Rights-of-Way,
16 if the tribe negotiations them that way could be in
17 perpetuity. And we would appreciate comments from those
18 of you, including you who have Rights-of-Way or are
19 subject to Rights-of-Way that are in perpetuity and my not
20 have worked out so well. Let us know what we might be
21 able to do with these rules to try and not make the same
22 mistake twice.

23 As far as the existing ones, there's very little that
24 could be done except for perhaps renegotiation. We know
25 that is happening in some places, including Salt River,

1 where there has been so renegotiation of those
2 Rights-of-Way and Western Area Power, in particular, has
3 changed some things.

4 MR. CHEVARRIA: Good evening Assistant Secretary. My
5 name is Michael Chevarria, I'm the Governor for Santa
6 Clara Pueblo. For public lands there only assigned
7 properties, the Pueblo takes ownership of those lands.
8 Also, my question -- you kind of answered that -- between
9 the individual and tribal lands, before it was up to the
10 tribes to then negotiate these Rights-of-Way. We do have
11 some perpetual Rights-of-Way regarding our state called
12 Therlean [phonetic] in the State of New Mexico. It is
13 very important that we address it because it is an impact
14 of transportation for all of our community there in Santa
15 Clara Pueblo. Is the BIA still going to have a hearing of
16 the function regarding the biological cultural assessment,
17 which is part of the requirements or is the tribe going to
18 have to use its tribal funds, now, as it did before those
19 functions on behalf of BIA?

20 Also, what is going to be the function of BIA for
21 appeals? One of the things that we're dealing with in New
22 Mexico is that some of the state legislators thinks its an
23 issue dealing with utilities crossing through tribal land.
24 Again, how do we deal with the issue involved with
25 electric also with PNM with the gas lines. Those utility

1 lines are very important and we still need the support of
2 Interior BIA on this initiative, because it is federal
3 law. It is not a state law. So that's what we're trying
4 to formulate as a position paper on the laws.

5 In August of 1924 Pueblo Land Act comes into play.
6 That's very important that these legislators don't know
7 the history of Indian law and how the rights are
8 disposition to negotiate these rights or the easements
9 through tribal lands. So again that's very important and
10 still have the support from BIA regarding those appeals
11 regarding some of these Rights-of-Way. And again, once
12 the process is going forward, will the regional director
13 be that person to then approve that Right-of-Way or would
14 it have to come to the secretary level for that approval?
15 So it is very important as we move forward, giving the
16 tribe the opportunity of performing functions on behalf of
17 BIA.

18 So again, once we go through this process, will BIA
19 come and perform audits on the tribe? Because now we're
20 receiving that money, it's just like they received money
21 for Forest Management Deduction, and also for realities
22 now they're getting audited from BIA to come and look at
23 those funds.

24 So it is very important as we move forward on this
25 process, I guess, submit a 5-page written comment relating

1 to some of the steps I gave to the Assistant Secretary.

2 Again, it's very important because it's not a
3 one-size-fits-all, but it gives the tribes an opportunity
4 of then how to then form these functions on behalf of the
5 Pueblo. I should mention, Assistant Secretary, the
6 economic ventures for the Pueblo, especially there in
7 Santa Clara.

8 So this will be very important as tribal leaders that
9 we understand and learn more so that we present this to
10 our tribal councils and into our communities. And so that
11 we're not -- we're fillig in those gaps; we have no loop
12 holes in there. So again, as we move forward, as you
13 mentioned since '68 to now, looking at those opportunities
14 will be very important. So I'm going to get some of my
15 comments that I have added to these comments that I
16 submitted to you. I think I have until November 3rd,
17 which is next week, to provide additional comments. But
18 again, Assistant Secretary, I appreciate the opportunity
19 for you holding this session this evening. Again this is
20 something else that's going to be very -- an opportunity
21 for tribes to then consider and move upon. So those are
22 just my comments. Thank you.

23 STEPHEN SIMPSON: Thank you very much, Mr. Chevarria,
24 on behalf of the assistant secretary. Assignments, I'm
25 looking to see if we have the provision in here, we may

1 not. I know that there is a provision in the leasing
2 regulations that talks about if tribal land is subject to
3 a tribal land assignment, would that -- we would not
4 grant -- we would not approve a lease without consent of
5 the tribe. We want not just the assignee, but also the
6 tribe. Because it's still tribal land. We want to make
7 sure that if that is not in the Right-of-Way regs, it
8 should be. So please check and make sure and we'll check
9 and make sure that it is.

10 On the environmental issues. The responsibility for
11 compliance with the Endangered Species Act is still with
12 the Bureau know matter what. The processing may happen as
13 part of your tribal contracts. The way we're talking
14 about with tribes taking over this process is through the
15 normal 638 contacts. So if you've already contracted
16 reality, that's what we're talking about here. That scope
17 would remain the same under these regulations.

18 Yes, you're right, the approval of Rights-of-Way is
19 delegated down -- it could always come back to the
20 assistant secretary, in a particular case, but it is
21 delegated down to the superintendent or the regional
22 director. And that doesn't change under these
23 regulations, either.

24 MR. CHEVARRIA: And the appeals process?

25 STEPHEN SIMPSON: The appeals process will remain the

1 same as it is now. There is a slight change in that we've
2 adopted a provision that we put in the leasing regulations
3 for if a superintendent or regional director is not making
4 a decision within proper a timeframe, you can ask the next
5 higher-up person in the bureau, up to the director, to
6 instruct that official to make that decision or make the
7 decision themselves. Instead of filing an appeal under
8 Section 25 CFR 2.82 to the Interior Board of Indian
9 Appeals. Because they aren't in that supervisory chain
10 and doesn't really make sense for them to be telling the
11 regional director to make a decision. It makes much more
12 sense for that regional director's boss, the director of
13 the bureau, to be telling the RD to make that decision.
14 So with that one difference, which again was adapted from
15 the recent regulations, the appeals process would stay the
16 same.

17 DEANNA SCABBY: Good evening. My name is Deanna
18 Scabby from Salt River Pima Maricopa Indian Community. I
19 don't know if the gentleman's question was adequately
20 answered concerning the WAPA, but Salt River did file suit
21 against WAPA and they too felt it was in perpetuity. And
22 what we did was -- I spoke to Christians -- I was the
23 Tribal Council Representative. We had 25 percent
24 ownership of that Right-of-Way, from 2007 and finally this
25 past June paid out to all the landowners. We initially

1 had 700 allottees names. By the time it was all over,
2 those who passed on and all the other relations, we had
3 well over a thousand maybe 1400 of those who were paid
4 out. So we did renegotiate, and was responsible to notify
5 the community prior to expiration of that Right-of-away.

6 JOE GARCIA: Good evening everyone. My name is Joe
7 Garcia, I'm from Ohkay Owingeh. I'm the head councilman.
8 I just wanted to also speak a little bit about what
9 Governor Chevarria spoke about, but generally, the tribal
10 council would support the changes on the proposal to make
11 compensations and evaluations. I think in the past we
12 were sort of -- the tribe was sort of at a disadvantage in
13 determining what amounts to charge for any Rights-of-Way.
14 Well, this go around the Pueblo of Ohkay Owingeh did
15 negotiate an amount with Amos Co-op, who is a cooperative,
16 nonprofit electric company in northern New Mexico.

17 There's questions about what negotiation vales were
18 set. It was a negotiated settlement for amount, so the
19 fact that there's no evaluations and the tribe can charge
20 as much as they want. So as long as it's negotiated
21 that's no reason -- the bottom line, I believe. The fact
22 of matter is that we are now being challenged by the state
23 government on that amount. So the question would be:
24 This comment is good to have in the proposed rule, but
25 what protection does then the tribe have for whatever is

1 negotiated on the amount?

2 There's been some proposed legislation by some
3 legislative people in New Mexico to stop the tribe from
4 negotiating whatever they think is an appropriate amount.
5 So basically, I'm not sure what it would do to our
6 settlement, but I'm not sure what it would do to other
7 opportunities that the tribes may have. They were taking
8 advantage of the tribe too long and now that we're sort of
9 stepping up and we know little bit more; the other side
10 doesn't like it. So I think it is important to keep an
11 eye on what's transpiring in New Mexico; it maybe
12 happening in the other parts of the country as well. But
13 we genuinely support the proposed changes. Thank you.

14 IRENE COOCH: Good evening, Kevin Washburn, Assistant
15 Secretary, I'm here with the Ute tribe, we have a
16 delegation here.

17 KEVIN WASHBURN: Chairman, would you identify
18 yourself by name?

19 IRENE COOCH: Okay. Irene Cooch, former chair of the
20 Ute tribe, Fort Duchesne, Utah. I have a delegation here,
21 current tribal council members that are here: Phillip
22 Chimbarras, Tony Small, and we also have Jeremy Henderson,
23 attorney from Oregon. Just wanted to state that we are
24 talking with our tribal delegation, the attorney, the Ute
25 tribe did submit comments on the proposed rules, dated

1 October 22, 2014. I think it is pretty self explanatory.
2 The Ute tribe does also have a resolution, which is
3 pending before the National Congress of American Indians.
4 The government resolution number is 14, Atlanta 14, and
5 it's the Ute tribes generally supports BIA proposed
6 Right-of-Ways. It is also pretty self-explanatory, it
7 does explain the reasons why they support it and also the
8 reasons where they have stated that -- I can read it, here
9 it is.

10 Therefore, be it resolved NCAI supports NUI's
11 proposed regulation to Right-of-Way of Indian land
12 provided that the issues set forth in this resolution are
13 addressed in the final regulations. Be it further
14 resolved, the NCAI request the regulations are modified to
15 remove any provisions of references to the application
16 state law to Rights-of-Way in Indian country in their
17 entirety.

18 The resolution is pretty self-explanatory. We would
19 like to ask that NCAI support this resolution. Ute tribe
20 has been a member of the National Congress American Indian
21 since its inception in 1944. We always have come to the
22 -- we've always attended the annual meetings. We believe
23 NCAI was sent to support sovereignty, also protect the
24 land and resources and also protect the rights of our
25 people. We're asking for NCAI to support this resolution,

1 our resolution. Also, I'm going to turn this over to Tony
2 Small or Phillip to make comments.

3 TONY SMALL: Good evening, my name is Tony Small, Ute
4 tribal council member. I just wanted to make a comment,
5 Mr. Washburn. It is important for BIA to make it clear
6 that the tribes retain sovereign authority and
7 jurisdiction over any Right-of-Way that they have granted
8 for any purpose and to clarify that state law does not
9 apply.

10 Also, applying state law to a Right-of-Way crossing
11 the reservation will compromise tribal jurisdiction. So
12 we have proposed modifications to prevent the application
13 of state law to land within our exterior boundaries of any
14 Indian reservation. Those are just a couple of the
15 comments I wanted to make. I'm going to give this to my
16 colleague, Phillip.

17 PHILLIP CHIMBARRIS: Thank you, Tony. This is
18 Phillip Chimbarris, council member of the Ute Indian
19 tribe. I have a couple of comments. The federal
20 government should respect fractionated ownership interest
21 in land by providing notice and notice to 100 percent of
22 Indian land owners and to acquire their concerns before
23 granting a Right-of-Way.

24 Another issue is there is know need for perpetual
25 Right-of-Way. BIA should replace Rights-of-Way that are

1 in perpetuity for Indian lands held in trust by the United
2 States with a term of 50 years.

3 JEREMY HENDERSON: Mr. Secretary, this is Jeremy
4 Henderson, serving as general counsel for the Ute tribe.
5 Just to echo the comments made by the Ute tribal business
6 committee members and Ms. Cooch. I think the regulations
7 by and large do go a long ways to improve the Right-of-Way
8 process and update the system that is very antiquated and
9 has been antiquated for decades. So in that respect, I
10 think, by and large the changes that are being proposed
11 with the regulations are positive. However, there's the
12 issues that the Ute tribe views as problematic that was
13 identified earlier on. The application of state law to
14 individual Indian Right-of-Ways and to allow individual
15 allottees to act where the state law can or cannot apply
16 as proposed to tribal and federal law to the governments
17 and administration Right-of-Way raises a whole host of
18 issues and it serves largely to undermine tribal sovereign
19 authority and jurisdiction. That's currently the issue, I
20 think you're aware that the Ute tribe is facing litigation
21 with the State of Utah where they're in a fight for the
22 lives of over jurisdiction as it relates to these
23 Right-of-Ways. I know this is a problem that other tribes
24 have experienced and to allow individual allottees to let
25 state law apply to that Right-of-Way just adds fuel to the

1 fire on that issue.

2 Separate from that, it's also problematic. I think
3 to have been language in the regs that allows for
4 extension of similar uses within the same scope for a
5 grant of a Right-of-Way. This has been a problem that a
6 number of tribes face throughout the United States, where
7 Right-of-Way might grant access for a pipeline, 3-inch
8 pipeline, as part of the Right-of-Way with specific
9 parameters of that Right-of-Way are identified and
10 granted. A company will come along and expand that
11 pipeline to 6 inches or they might add four more
12 pipelines. The language that seems to allow for similar
13 usage, I think, could be exploited by these companies
14 where they come in, if it's for a power line, they might
15 not have additional latitude or they might expand it out
16 to 12 lines, which would raise a number of issues.

17 We also have problems with companies that try to
18 piggyback on Right-of-Ways. So if a utility has a
19 Right-of-Way for a pipeline to deliver water, another
20 utility will try to piggyback on that Right-of-Way to add
21 another pipeline to deliver gas. So that language that
22 allows for expanded or similar uses within the same scope,
23 I think, would cause a host of problems and not add
24 clarity to the process.

25 Similarly, there's also, I think, the problem in

1 allowing for the Rights-of-Way to regulations to be
2 applied retroactively. We've heard from a number of the
3 Ute tribe's industry partners that this will create
4 further level of uncertainty in terms of Rights-of-Way
5 that have been negotiated. As we read the regs, the
6 regulations, with their specifics would trump any contrary
7 terms in existing Rights-of-Ways that have been set forth.

8 But a number of these past Rights-of-Way don't
9 contain specific provisions that deal with mortgages and
10 other items. So this would lend further uncertainty to
11 the Right-of-Way process which would very likely resolve
12 the litigation, which would inevitably resolve in further
13 delays for the implementation of positive changes that, I
14 think, can come about through these regulations.

15 So looking at the retroactive application of these
16 Right-of-Ways, I think, it is really critical as this
17 process moves forward. Thank you.

18 STEPHEN SIMPSON: Thank you very much. We look
19 forward to the detailed comments that you've submitted.
20 We are concerned about jurisdiction. I understand that
21 one particular provision in is may be problematic. If
22 you've got suggestions for how to change that, we would
23 appreciate it.

24 I would also appreciate you looking at Subsection E
25 of that same section, which is the one that talks about

1 retaining tribal jurisdiction and retaining tribal law of
2 the Right-of-Way to try and make a point that -- to say
3 where the Supreme Court said it straight to BIA, when
4 contracting, the tribe could not retain jurisdiction in
5 that particular Right-of-Way. We're trying to retain that
6 jurisdiction. We're trying to make sure that the tribe
7 can keep that jurisdiction. So if you could take a look
8 at that provision, we'd appreciate that and any
9 strengthening we could do there.

10 On the piggybacking, this is a new provision in these
11 regulations. We have not had a provision about similar
12 scopes in previous Right-of-Way regulations. If we need
13 to tighten that, please let us know. In any case, please
14 give us some specifics on how to do that and we would very
15 much appreciate it.

16 KEVIN WASHBURN: One moment, Reid. Let me ask a
17 question of you folks. You don't need to address it right
18 now. You don't need to answer that question. Mr.
19 Morris's [sic] -- Council member Morris's request raises a
20 question for me. Which, I think what he said is that the
21 federal government should never grant a Right-of-Way in
22 perpetuity. What our proposed regulation says is that we
23 will defer to the tribe on term length. So the way I read
24 that is it's saying that even if the tribe wants a
25 Right-of-Way in perpetuity, we should not grant that.

1 That gives me some pause, because I strongly believe in
2 the tribal self-determination and the tribes ability to
3 make those determinations. I can imagine the situation
4 where there's someone maybe that wants to build a road,
5 instead we don't give them perpetuity we're not going to
6 build a road. We're not going to bring our capital to the
7 reservation and build on the reservation.

8 So I guess I want to make sure I understand. Do
9 people not want the tribal government to have the right to
10 obtain a Right-of-Way in perpetuity? That's what we say
11 we're going to defer to the tribal government. Do you
12 think we shouldn't give the tribal government that option,
13 is basically the question? If other people have views on
14 that, we'd be delighted to hear that. Thank you.

15 Mr. Chambers?

16 REID CHAMBERS: Thank you. I'll try to talk to that
17 and a couple of these other points. Kevin, first, let me
18 commend you and your staff --

19 MIKE BLACK: Tell our reporter who you are.

20 REID CHAMBERS: I'm sorry. I apologize. I'm Reid
21 Chambers from the Sonosky firm. I'm accompanied here by
22 my colleague Tanner Amdur-Clark, from our firm. I do want
23 to commend everyone who has worked on these regulations.
24 This is a major improvement and modernization. It does,
25 as you said, follow the leasing regulations, these are

1 very good regulations that can be made somewhat better.

2 So we will submit comments on November 3rd. And Kevin let
3 me also thank you for extending the comment period this
4 last time past October 2nd. It did permit this listening
5 meeting here tonight and it did permit tribal leaders to
6 hear this and to make additional comments. So thank you
7 so very much for doing that.

8 On the state jurisdiction point, I think there's a
9 simple solution: Take it out. It shouldn't be in the
10 169-008 proposal and it shouldn't be there for an
11 additional reason, in addition to whatever everybody has
12 said about it. In our view, the Kennerly case forecloses
13 the application of state jurisdiction over an Indian
14 granted Right-of-Way whether by a tribal member or by a
15 tribe absent a statute of congress conferring that
16 jurisdiction over the state.

17 Certainly, whatever authority the tribe has to barrow
18 state law. We think that is also barred in the Kennerly
19 case; the Supreme Court decision in 1971, absent of that
20 of Congress. Certainly, an individual doesn't have
21 authority to extend state law over the Right-of-Way on an
22 allotment on an Indian reservation. Tribal law applies to
23 an allottee, federal law applies to him or her, and an
24 individual has no authority to infer to that kind of
25 jurisdiction of the state by agreement or the practices.

1 Kevin, let me speak for a second on this perpetual
2 Right-of-Way issue. I think it's the wrong question --
3 the wrong way to frame the question, as a matter of tribal
4 self-determination. I mean I understand that formulation.
5 The better way to look at the question is why and at what
6 circumstances would there ever be a need for perpetual
7 Right-of-Way? Now, if you paused the situation with a
8 road and there may be situations where the road really
9 does need to be in perpetuity.

10 The current regulations are confusing and somewhat
11 internally self-contradictory, but they appear to set a
12 20-year timeline for gas pipelines in part 25. And a 50
13 year timeline on electric power lines in 27, 27(d) in the
14 existing regulation. Those are excellent limitations for
15 those kinds of uses. It's hard to conceive -- if you have
16 an oil and gas pipelines that benefits the tribe, there
17 may be a reason to make it longer. But as you know
18 throughout the West, there are oil and gas pipelines and
19 electric lines going from some point off the reservation
20 to some distance city off the reservation that provide no
21 service and no benefit to the reservation. It's just hard
22 to imagine that there's any legitimate basis for perpetual
23 Right-of-Way for that kind of use. Plus you write these
24 regulations in the context of a very good study that the
25 department did, the Department of Energy, I think in 2006,

1 around then. It was mandated by the Energy Policy Act
2 about the history of Rights-of-Way and compensation for
3 tribes on Rights-of-Way. And what, for example, Chairman
4 Hayes was talking about with the perpetual Right-of-Way.
5 That study showed the terrible history of overreaching not
6 just by WAPA, not just by a federal agency where there's a
7 conflict of interest, but also by private industry. It
8 grossly under compensated tribes for Rights-of-Way.
9 That's something that has changed and it wasn't something
10 that happened on your watch. Maybe, honestly, that was a
11 little more on my watch.

12 Assistant Secretary, that was the defect at that
13 time. The remedy for that has been when these
14 Rights-of-Way expires at that time tribes can come and see
15 jus compensation for the use of their unique reservations.
16 Indian reservations are not just like other land out in
17 the West. They're unique, historic homelands, as you well
18 know, of Indian tribes. Tribes have been very successful
19 in recent years. And I think the renewal time should be
20 relatively short. Almost all of these true-put lines have
21 been fully depreciated, they've been there for many years
22 and it's time for tribes to be fairly compensated.

23 So we would strongly question whether you should have
24 a provision in there allowing for perpetual Rights-of-Way,
25 at least for most uses. I think that really needs to be

1 addressed in the context of the terrible history of not
2 fairly compensating tribes for uses of all kinds of
3 Rights-of-Way on their land.

4 I should add on the piggybacking provision. We will
5 make specific comments on how we think Steve can
6 strengthen it. I think you all are to be commended among
7 the many things, you know, this is an A minus job. We
8 just need to make it an A plus job. We don't want to go
9 back for another 20 years.

10 STEPHEN SIMPSON: I appreciate that good of a grade.

11 REID CHAMBERS: I think it's very, very wise that
12 you've raised this piggybacking problem. It has been a
13 problem for many reservations and it should be foreclosed
14 and we would have specific comments on that.

15 The last thing I want to say is on tribal ownership
16 of fractional interest in an allotment. We don't know of
17 any authority that allows the secretary to grant a
18 Right-of-Way over any tribal land, including a tribal
19 interest and a fractional allotment, even if it's a
20 1 percent interest or something like that without the
21 tribes consent. Certainly, for a tribe organized under
22 the Indian Reorganization Act. The Federal statute that
23 you're relying on, the 1948 Statute, specifically bars
24 that. But your regulations certainly, since the 60s and I
25 think going back before that, provides it for all tribes.

1 There shall not be any grant of Right-of-Way over tribal
2 lands without tribal consent. That's been the
3 longstanding practice, you should not change that -- the
4 tribal ownership of the fractional ownership in an
5 allotment is another abuse of tribal land.

6 Thanks you for a good job. I look forward to you
7 giving some improvements.

8 MAJEL RUSSELL: Thank you. Majel Russell, I'm with
9 the Elk River Law Office in Billings. My comment is
10 pretty much consistent with Mr. Chambers' comment. We
11 also -- Clark Madison is here with me. We also were
12 concerned about how you're going to force a Right-of-Way
13 on fractional interest in a tract that is owned by the
14 tribe. We are trying to make sense actually what
15 specifically Section 169.107(d) says. We were looking and
16 trying to understand exactly what that means. It seems to
17 be that you're saying you can grant the Right-of-Way
18 across a tract of land with an undivided interest held by
19 the tribe, but the tribe would be a non-consenting party
20 to the Right-of-Way. We're not real clear on what that
21 would mean. So I'll let you address that.

22 But also in addition to that, I think that we're all
23 thinking a lot, in Indian country, about the back end of
24 buyback. The back end of the buyback program where we're
25 envisioning that the tribe is going to own a lot of

1 undivided interests with allottees. And we see here that
2 there are different standards in terms of how you're going
3 to compensate a tribe or how you're going to arrive at
4 what compensation for a tribe would be and how
5 compensation for an individual owner would be. We're
6 wondering how these different standards are going to work
7 when you have tracts of land where you have individuals
8 and the tribe owning undivided interests.

9 I think that will be a very pertinent issue as we
10 move through the buyback program and the tribe requires
11 fractionated interests, sometimes not real small
12 fractionated interest, but clearly undivided interest in a
13 tract. Thank you.

14 STEPHEN SIMPSON: Thank you very much, both Majel and
15 Reid for bringing this up. What the provision that you
16 point out in 107(d) is, again, from leasing regs but more
17 importantly it comes out of the Indian Land Consolidation
18 Act Amendments of 2000. The applicable percentages there
19 that -- it just occurred to me -- apply to leasing and not
20 Rights-of-Way. So but that's where that comes from and
21 that's where that concept of a grant of a over the
22 non-consist of a tribe comes from. So if you can think
23 about that tension and give us comments on your views on
24 how that should work and why Rights-of-Way in this context
25 are different than leases, we would appreciate that.

1 But that's where that provision comes from and if you
2 ask me what 107(d) means, I'm not sure I could tell you
3 either. It's up straight out of the statute and I'm not
4 even sure that the current general counsel of NCAI can
5 tell you that, because I asked him. But that's the
6 statutory language and that's where it came from. And so
7 that's the tension we're looking at, between the 1948 Act
8 and the ILCA Amendments of 2000. So if you can let us
9 know what you think about that, we'd appreciate it.

10 REID CHAMBERS: Well, Steve, I'm not suggesting that
11 a Consolidation Act implicitly repeal the '48 provision
12 and the 24 -- I mean that's --

13 STEPHEN SIMPSON: I am not. I am not. In fact, I'm
14 telling you that that's where it came from and it may be a
15 slip on our part.

16 REID CHAMBERS: Okay.

17 STEPHEN SIMPSON: So if that gets me from the A minus
18 up to an A, I'll be in good shape. No and, in fact, it
19 just occurred to me as you and Majel were talking about it
20 that, that's where that came from. And I had a little
21 thought up here that, oh, wait a minute, the '48 Act may
22 not be consistent there. So let me know what you're
23 thinking.

24 JOHN LEWIS: John Lewis from Gila River Indian
25 Community. I'm the chairman of the Gila River Indian

1 Community Utility Authority, GRICUA. First, I think want
2 to kind of chime in on the comments from Ute Mountain, the
3 chairman, regarding WAPA. I think our experience with
4 WAPA has been equally underwhelming and not spectacular.
5 I think that there's a reason why there's a lot of not
6 uncertainty, but, I think, just regarding the WAPA
7 process. And I think the whole experience has left a very
8 bad taste and that's been resonating for a very long time
9 in Indian country. The experience of some of these
10 situations, you know, as a whole, I think, us talking
11 about it is beneficial.

12 The point I do want to bring up as a comment is with
13 regards to subpart F, the service line agreements. So I
14 think on a whole, I think, the proposed rule, in general,
15 I think it's a very good start. It's a good fresh look.
16 So from my perspective, as part of the GRICULA, the wholly
17 owned enterprise utility authority of the Gila River
18 Community, I think it's a good look, but I'm a little
19 concerned about the service line agreements. Where my
20 concern lies is that there is no Right-of-Way grant
21 required for service lines. So the expansion of services,
22 the existing service lines, or new service lines that a
23 non-community, non-tribally-owned utility could expand, I
24 think would concern me. They could extend lines. There's
25 also no restriction, no definitive capacity limitation.

1 So whether that's a distribution level -- a different type
2 of distribution level, distribution line, whether it's
3 heating or electricity, that would concern me. I think
4 that could work in our favor as the tribal-owned electric
5 utility, because we would have service lines that we want
6 to expand and that would work in our favor.

7 But I think if there was an SRP, Salt River Project,
8 APS, Arizona Public Service, utility, various non-Indian
9 utilities that would want to -- I meant that would not
10 only create -- we would want to limit the level of energy
11 infrastructure that we don't own. It seems that there's
12 no check on that. So that would be my concern. I think
13 it should be limited to -- there should be no Right-of-Way
14 grant required for service lines. That should be limited
15 to tribally-owned enterprises and the utility authorities.
16 That would be my one comment.

17 STEPHEN SIMPSON: Thank you. You bring up a good
18 point. The point that we've been struggling with. What
19 we're referring to -- the service line piece is in the
20 current regulations. We've had some discussion,
21 especially, with utilities, as to exactly what that means;
22 what we're referring to there. So what I think -- what we
23 think of is it may be that we're talking more about what
24 the utilities would refer to as service drops, rather than
25 service lines, which is -- if you've got a line --

1 For instance, in my neighborhood in Maryland, I have
2 a line that goes down one main road and then I live on a
3 street coming off of that. There's a line that comes from
4 that main line down my street. Then there's a line that
5 comes into my house from that line down my street. What
6 we're referring to -- what we're attempting to refer to as
7 service lines in this regulation is that line coming into
8 my house, not the one going down my street from the main
9 line.

10 I understand that from some of the discussions we've
11 had with utilities about their comments, that they be more
12 accurately referred to as the service drop. So if we need
13 to, that's where we're headed here, is the line from some
14 kind of service -- line to an individual dwelling or an
15 individual building. So if there's something we need to
16 do with the definition to make that clear that that's what
17 we're referring to, that would be very helpful to know.

18 JOHN LEWIS: Sorry. I don't need a microphone.

19 STEPHEN SIMPSON: That's okay.

20 JOHN LEWIS: I think that would be easily tightened
21 up.

22 STEPHEN SIMPSON: Yes.

23 JOHN LEWIS: As I think that you're going to do --
24 there's some leeway. I'm not saying this in a very
25 adversarial way, but I think utilities will do it until

1 they're told not to.

2 STEPHEN SIMPSON: I understand that and I want to
3 tighten that up for that very reason.

4 JOHN LEWIS: Right. In our experience, we have
5 electric distribution level lines that have surface drops
6 to a specific household, we also have expansion of service
7 lines that are kind of like sub-distribution levels.

8 STEPHEN SIMPSON: Right.

9 JOHN LEWIS: They know what they're doing. We know
10 what they're doing, but it's up to us to call them on it.
11 If we don't have federal rulings to back us up, they're
12 not going to -- I mean it's going to be one of those
13 things.

14 STEPHEN SIMPSON: Give us a way to fix it and to
15 tighten it up.

16 MARTIN HARVIER: Good evening. First of all I want
17 to thank you all for meeting with us this evening. My
18 name is Martin Harvier, I'm the current vice president for
19 the Salt River Pima Maricopa Indian Community. I want to
20 thank Mr. Simpson, I know you came to the community and
21 met with the leaders in the metro area. I want to thank
22 you for coming out and meeting with us.

23 I was looking at the board there and I remember the
24 staff was trying to get all the comments put together by
25 the 18th. I see August 18th is scratched out. I didn't

1 know there was an October 2nd that was scratched out. But
2 now there is a November 3rd. Have any of the previous
3 comments -- I'm wondering have any of the previous
4 comments that have been submitted and be responded back to
5 yet on our concerns that we have?

6 STEPHEN SIMPSON: No. We will be responding to all
7 of the comments in the final regulation.

8 MARTIN HARVIER: In the final regulation?

9 STEPHEN SIMPSON: Yes, and in the preamble to the
10 final regulation.

11 MARTIN HARVIER: I believe I've already made our
12 concerns, but I just wanted to make the point here that I
13 did hear fractionalization. I know Mr. Washburn knows
14 about our issues that we faced here at Salt River with
15 fractionation. Not all development is commercial in the
16 community, this could be tribal government projects that
17 we're trying to make sure we try get those services to
18 members of our tribe. We have one situation where we have
19 a line trying to go over three allotments and there's over
20 600 individuals that are apart of the Right-of-Way to get
21 that service to. So these are the issues that we're
22 facing.

23 I know one of the questions we did ask, this seems
24 like it's going to put a lot more work on the Bureau, and
25 just our concern, about the turnaround time of getting

1 things done on their behalf. These are some things that
2 I'm hoping those are the responses that you'll get back on
3 how you're going to get those responses back to us in
4 development.

5 Right now as far as commercial, I think we have staff
6 that are committed and professional in doing their job,
7 developers from the outside want to come in, they know
8 that the process is going to get done fairly quick so that
9 they can get their project in the ground and they can
10 start making money because that's what it's all about.
11 I'm just hoping that some of the responses of what you're
12 going to put into place so that it's a timely response
13 back to the tribes on whatever development they were
14 doing. Again, it's not all commercial, we're facing
15 community development by the tribes. I just wanted to
16 bring those comments to you. Thank you.

17 MIKE BLACK: Yes, that's the real focus. This is
18 Mike Black, with BIA. I appreciate the comments. To that
19 is point, my hope is in looking at the regs and stuff, is
20 yes. It looks on the face of it that it could create more
21 work for BIA, but in the end it actually provides more
22 clarity for our staff. It simplifies our processes. It
23 provides more clarity. There's a lot more definitions in
24 relation to all of it.

25 Right now, we're trying to get a lot of different

1 things into one Right-of-Way. And now we ask for specific
2 guidelines of those areas and it also imposes those
3 deadlines that 60- and 30-day deadlines for us to review
4 and approve these. Hopefully, you'll find that to be a
5 quicker process than we're currently going through now.

6 MARTIN HARVIER: Just to comment on that. I know
7 he's got the mic. I think one of our concerns is being a
8 self-governance tribe, I think that's going to put more
9 work and the responsibility back on the tribe to make sure
10 we go through all of the processes. I just wanted to
11 bring that up, also.

12 RON ROSIER: Good evening. My name is Ron Rosier,
13 I'm the attorney with the Gila River Indian Community and
14 I want to thank the BIA for going through the process of
15 updating these regulations. I can see that that is a
16 positive step forward, it does do a lot of benefit. I
17 think in some areas and in some of our comments we do want
18 to move further and then still help out. We were impacted
19 in the Gila River Community because we're the largest
20 provider of infrastructure within the community and we go
21 through a lot of lands. When it's done on tribal trust
22 land, no issues, no tribal council pushing tribal issues.
23 Going through allotments that can be an issue in a sense.
24 Also we have two very large utility companies that have
25 corridors going through the reservation in which the

1 Rights-of-Way expired. We entered into negotiation
2 process for ourselves and on behalf of our allottees. We
3 are able to get a significant compensation packages for
4 both the community and for the allottees at the same
5 standard applying to both.

6 Once we renegotiated these deals, then we had to turn
7 around and go through the consent process. And it can be
8 very difficult because of this extreme fractionation that
9 exists within the reservation. So to point to the issue
10 of life estates of native land under 169.003. We see in
11 there that if we get the consent of the life estate
12 holder, we're good, we don't need the remainder. That's a
13 benefit because as you know under the law right now, all
14 money must be in agreement between the two parties. If it
15 goes to a life estate holder and it's almost impossible to
16 get consent of the remainders. We see that as a positive
17 step.

18 What we're concerned with though is that under the
19 regs, if the life estate holder -- if the life estate
20 comes to an end, then for those tracts that are wholly
21 owned by a single life estate, the Right-of-Way term
22 expires with the holder of Right-of-Way. And then in
23 situations in which the life estate holder, the remainder
24 of them, that interest is necessary to obtain majority
25 approval for all of the allotment for 51 percent. The way

1 we read the rules, if that interest passes or if the life
2 estates ends, then the Right-of-Way would also end for
3 that allotment, too. So what we propose is that a
4 solution to that is that the remainder would be entitled
5 to compensation of the then agreed-upon compensation
6 package prorated for the years remaining on the term of
7 the Right-of-Way. So that if the grantee is going to pay
8 that, the Right-of-Way would continue in effect and
9 otherwise you would always have to do a new Right-of-Way.
10 You have to carve out, go around, you would have to pull
11 out lines, and just the cost of that can be extremely
12 expensive. So we offer that as a possible solution.

13 The other thing is on the "So numerous" exception.
14 And again, a very good idea, we like it. We just think
15 the thresholds are really high. We're going through a
16 couple of large revenue projects renewals right now and we
17 looked at that. We have thresholds between 50 and 100
18 members. If there was an individual owner who did not --
19 I mean if the owner did not own 10 percent or more, than
20 in that situation NCAI could get approval. Then over 100
21 percent -- over 100 you can also get approval as well.

22 In looking at one of our Right-of-Way projects, we
23 actually did the numbers, between 50 and 100 and still we
24 have a significant amount of landowners who probably own
25 10 percent and it doesn't benefit us, it doesn't help us.

1 So what we would recommend is lowering the threshold so
2 that if you had between 25 and 50 landowners and none of
3 them had an interest over 10 percent, that the BIA could
4 grant approval. Then top threshold will be at 50 land
5 owners and above, again BIA can have final interest in
6 that could give consent as well.

7 In regards to the perpetuity discussion on
8 Rights-of-Way, I agree -- we agree that in the context of
9 a third-party, having a Right-of-Way for perpetuity is
10 just, sometimes it's not -- especially for something given
11 so long ago it seems not right, not equitable. But on the
12 other hand, I think, for right of the products involved,
13 tribal, utilities, that they're going through, we're going
14 to be owing them forever to benefit a tribal interest. In
15 those contexts, the perpetuity, I think, is appropriate.
16 Again, trying to be equitable about everything.

17 Funding. One last comment is that I think under the
18 rules or that the issue of a tribal corporation separately
19 gets parceled out and so even they got to get federally
20 approved Rights-of-Way. We don't understand the interest
21 that promotes, the federal interests. Like for instance,
22 the community does have wholly owned utility corporations,
23 the community puts an infrastructure within the community.
24 And under those situations, we don't think that they need
25 to get federally approved. We just don't understand what

1 that does. Now, granted we understand for allotments,
2 either the tribe has to get a Right-of-Way approved by the
3 federal government because it's going allotments. Tribal
4 trust lands, you shouldn't, you know, be on tribal utility
5 corporation, you should get federally approved
6 Right-of-Way. Thanks.

7 STEPHEN SIMPSON: Let me say one thing about the life
8 estate piece. Because this is a difficult thing and it's
9 based right now -- it came to our attention on an IBIA
10 decision. And again this is something that is not in the
11 current regulations, we're trying to address the needs.
12 The reason the life estate piece is written the way it is,
13 is because we've bantered about life estates owner and
14 without regards to waste and how we're going to tell deal
15 with all of that. And then we realized that a life estate
16 owner can only grant what they've got, under basic
17 property law. So that's the reason it's written the way
18 it is.

19 We've looked at it, I've seen your comments and that
20 maybe a good solution. But we would appreciate that,
21 that's why we're doing it the way we're doing it. So if
22 there is a better way to get that life estate, that
23 Right-of-Way able to not have a hole in the middle of it
24 for that life estate, we'd appreciate it.

25 RON ROSIER: Just a comment back. We've run into a

1 lot of life estates situations --

2 STEPHEN SIMPSON: Yes.

3 RON ROSIER: -- so it's not like just seeing it here
4 or there, we get that, especially for the large project we
5 had, a number of life estates.

6 STEPHEN SIMPSON: That's why I appreciate your
7 comments on that.

8 JULIANN BALTAR: Hello, I'm Juliann Baltar, I'm with
9 the Bristol Bay Native Association up in Alaska. I have a
10 number of comments. The first I would like to make is
11 that I'm not sure why these kind of regulations aren't
12 done by a tribal negotiated rule-making. It seems that
13 the topic is so complex and the tribes that are running
14 the various programs have so much information that needs
15 to go into the rewriting of these regulations that it
16 would just save an awful lot of time, really if you would
17 just do it as a negotiated ruling.

18 On the topic of perpetuity, something that we're
19 doing -- some of us are doing it up in Alaska. When we
20 have lines that cross into restricted lands is we write
21 language into it that says -- for instance, a public
22 roadway easement or Right-of-Way it will cease to exist if
23 the Right-of-Way is abandoned for it's original purpose.
24 So we don't mandate that the tribe has to make a decision,
25 just that if it's not used for what it was, the

1 Right-of-Way was provided, it goes away. It goes back to
2 the original land owners. That actually seems to be
3 pretty comfortable for most of the people that we've
4 worked with.

5 I'm not sure how well Alaska is covered in the
6 regulation. We've got a really odd situation up there.
7 There were many -- there was a solicitors decision, I
8 believe it was back in the '80s, where he told the BIA
9 essentially that we could not have BIA owned roads. We
10 were not allowed to have BIA owned roads, so even though a
11 lot of easements were taken or Right-of-Ways were taken
12 across restricted lands and in many cases across the
13 Alaska Claim Settlement Act lands, they were given to a
14 city government or somebody else. They weren't even
15 provided to the tribes at that point. I'm not sure how
16 this fits in, but it seems that we've got some unique
17 situations up in Alaska that aren't really covered very
18 well. And, in fact, we've sort of, you know, other than
19 dealing with restricted land, this regulation hasn't only
20 applied to us for the most part, but it could in the
21 future. It certainly could in the future.

22 There are some other things that are going on in
23 Alaska and I don't know if it's across the country or not
24 but it has to do with regional office telling us that
25 they're willing to go to city codes.

1 We've got this unusual situation in Alaska. We have
2 Alaska native villages that are layered on top of little
3 small city governments that fall under the state
4 requirements. We don't know if that's really true, but
5 we're being told that if the restricted land wants to do a
6 subdivision, that they have to follow the city's codes for
7 public roads. It has to meet their width requirements,
8 things of that nature. I don't know if that's true, it's
9 not spelled out in the regulations. So it's an area that
10 leaves us with a great amount of uncertainty. Of course
11 we got a lot of combination land. We've got a lot of
12 restrictive land that's allottees and we've got a lot of
13 fee land. A large number of the tribes have been taking
14 fee lands and they're building roads now days. They're
15 taking on fee lands property owned roads.

16 Is there anything in the future that would say they
17 couldn't ask that these be BIA owned Right-of-Ways? So I
18 don't know if that's covered, but it seems like Alaska's
19 situation is so strange and different that it's not really
20 well covered in the regs, proposed regulations. Thank you
21 for this opportunity to comment.

22 MR. CHEVARRIA: Assistant Secretary, again, Governor
23 Chevarria from Santa Clara. I want to make sure that we
24 don't lose track of the program services that typically on
25 the behalf of BIA, especially to the office of the special

1 trustee, the Office of Trust Services, and the Division of
2 Real Estate Services. Those are very important as you
3 mentioned, there is a mechanism for the 638 contracting
4 that would take on that responsibility. Eventually we
5 could add it to our Salt River contracts. I want to make
6 sure that the technical assistance is still provided
7 through those programs and departments. That's way I
8 mentioned what is happening, because now it's important as
9 far as management that the deductions and the appraisals.

10 So I had Mr. Allan Sherry come down to Santa Clara
11 and then do the audit on our Pueblo, because they took
12 over that function to make sure we are following the CFR.
13 And so that's going to be very important for tribes to
14 understand, once you take that responsible over, now we
15 want to make sure we understand the CFR, which is that
16 part of 169. And so it's going to be very important as we
17 move forward. I don't want the BIA to wash their hands
18 away from this.

19 I've addressed this to Mr. Black, dealing with our
20 Salt River contracts. What I'm being told is that Santa
21 Clara, took over these services, so BIA is no longer
22 involved. That's not correct. You're still the trustee.
23 You still provide a technical assistance, even though it
24 took our tribal share. So that tribal share is going to
25 be very important as we go forward to contracts somewhere

1 down the road into the future. So I'm going to make sure
2 that the tribes do understand, once you take these
3 responsibilities there is still some kind of ties to the
4 BIA and that we still have your support.

5 For example, I have leases and Rights-of-Ways that
6 have not expired between the city of Espanola. The city
7 of Espanola is within the exterior boundaries of Santa
8 Clara Pueblo. So that's why it's kind of important where
9 it's not one-size-fits-all, but it gives us the
10 opportunity of how do you then deal with these situations.
11 So that is just an additional comments. Just listening to
12 how these things are going to work gives an opportunity
13 for the tribe, but, again, BIA has to understand that we
14 still have roles and functions that we have to perform on
15 behalf us as trustee for tribal nations.

16 KEVIN WASHBURN: Thank you, Governor Chevarria. Let
17 me just note even in Santa Clara Pueblo, the United States
18 Attorney's Office has been pursuing potential litigation
19 against the county or the city?

20 MR. CHEVARRIA: City.

21 KEVIN WASHBURN: So that is the United State's Trust
22 responsibility in action. You've contracted for the
23 program and the United States still has a trust
24 responsibility as the trust land. In that situation, they
25 are standing up for that trust responsibility and

1 potentially going after the trespassers on trust land. So
2 we hear you. We hear you loud and clear. We certainly
3 intended for the trust responsibility to continue.

4 MARTIN HARVIER: Can I just ask a question real
5 quick? I think I can talk loud enough. This is Vice
6 President Havier from Salt River. Just kind of going over
7 this, just an for example, we have an existing road with
8 an existing Right-of-Way for that road. Say its 40
9 feet -- I'm not sure what the Right-of-Way for a road is.
10 If the tribe want to put infrastructure within the
11 Right-of-Way of that road, is the process of gaining new
12 Right-of-Ways for whatever, say a sewer line. Is there a
13 new Right-of-Way that has to -- a new process that has to
14 take place to put a sewer line within an existing road
15 Right-of-Way?

16 STEPHEN SIMPSON: That's what we've been talking
17 about in terms of piggybacking. If the original -- our
18 theory is, and what we're trying to say in the regulation,
19 is that if the original Right-of-Way is for a road, then
20 yes, to put a sewer line in that road is a different, in
21 that Right-of-Way is a different use, a separate use and
22 therefore you would need a separate Right-of-Way for that.
23 If that's not clear from the regulation, then we need to
24 tighten it up. But that's where we're headed. And if you
25 think that's the wrong way, let me know that too.

1 MARTIN HARVIER: I guess that's what I'm saying.

2 Some of these are projects for --

3 STEPHEN SIMPSON: That's what we're saying.

4 MARTIN HARVIER: -- the benefit of our members to put
5 on a sewer line and to get them off of septic systems,
6 which is contaminating the ground. Just the signature
7 part that we have to go through now because of the
8 fractionation. Thank you.

9 LIZ APPEL: Other comments?

10 RON ROSIER: This is Ron Rosier, from Gila River.
11 You're probably going to talk about this. When are you
12 going to roll out the regs? I mean what's the expected
13 date?

14 KEVIN WASHBURN: All right. You can't keep asking us
15 for extensions and then say, when the heck are you going
16 to get it done?

17 RON ROSIER: I've got to get a deal done before.

18 KEVIN WASHBURN: Are there other comments before
19 we -- we can't address some of these issues.

20 DAUBS THOMPSON: Assistant Secretary Washburn, we
21 appreciate it. I think everybody in the room is in
22 agreement that the proposed regulation are a much better
23 start than what currently exists. Excuse me, my name is
24 Daubs Thompson, I'm an attorney in the law firm of
25 Greenberg, Traurig.

1 Everybody's excited to see some sort of new change to
2 these regulations. One thing I think would be helpful is
3 there's a certain provision in there right now where BIA
4 will defer, to the maximum extent possible, to a tribes
5 determination that the compensation they are receiving is
6 jus or is adequate. I think that would be a good idea to
7 have a similar provision with regards to allotments. The
8 reason for that is is that the way the regulations are
9 currently drafted, an entity seeking a Right-of-Way can
10 provide any type of form of compensation; whether that's
11 services in lieu of, or whether that's something
12 different. But BIA is still required to prepare a fair
13 market evaluation. I think it can be very difficult,
14 especially within the 60-day timeframe for BIA. For
15 example, compensation is consideration in lieu of to
16 compare that to a fair market appraisal evaluation.

17 So I think it would be helpful for there to also be a
18 provision in here that permits allottees to determine if
19 the compensation they have negotiated for is reasonable
20 and is jus for BIA two defer to that as well.

21 KEVIN WASHBURN: Okay. Anybody else have comments?
22 Majel Russell, over here.

23 MAJEL RUSSELL: I didn't say it earlier -- Majel
24 Russell, Elk River law office. I didn't say earlier and
25 want to say now that I do think that this is very

1 progressive. I understand the intent and I think it's
2 very positive. I did want to say that. There are lots of
3 things that I think we can add and just maybe try to
4 understand a little better. In terms of what Daubs was
5 just saying, we were also thinking about, for example, at
6 Fort Berthold, where the tribe has established minimums
7 for Rights-of-Ways over allotted lands. They've developed
8 an ordinance for the whole reservation. Now, in order to
9 get a Right-of-Way, they've established by ordinance what
10 the payment will be to the individual landowners.

11 I'm wandering in those circumstances when a tribe
12 does do that, how would you measure whether or not that's
13 fair market value, or how you will measure that type of
14 standard Right-of-Way ordinance that a tribe may pass? So
15 that's one thing I think we need to think about.

16 We're also real confused about the life estate
17 provisions. So I think that we probably will try to
18 provide you with some comments. I see we just have a few
19 days here on the life estate provisions. I think there
20 are some valid questions in terms of what the life estate
21 holder can do to find the property beyond the tenancy --
22 or beyond the life of the life estate holder. So I think
23 we've got some issues with that section, also.

24 Also, I did want to mention to -- I don't know if
25 she's still there. We actually think that the process

1 that you're utilizing to draft these regulations is an
2 adequate process. I think that negotiated rule making, in
3 my experience working in Indian country has been very
4 difficult, because we would have to bring a lot of the
5 parties to the table other than tribes. So we would
6 probably have bring cities, and towns, and industry, and
7 states, and other parties to the table that, I believe,
8 would possibly bring an interest that we don't necessarily
9 need to accommodate within the process. I would comment
10 that I think the process that you're utilizing is an
11 effective process for Indian country. Thank you.

12 CLARK MADISON: My name is Clark Madison from Fort
13 Berthold. I'm working with Majel as a consultant and Elk
14 River law office. I want to tell Steve and the group that
15 put this together, you've done a good jog. I think Reid
16 may have graded you a little bit higher than I would have.
17 Overall, I think it's a good attempt at getting things
18 updated. I think you have some aggressive issues about
19 the BIA like piggybacking. There are still a few things
20 that need to be clarified. Overall, I think you did a
21 good job.

22 STEPHEN SIMPSON: Clark, I figured you'd probably be
23 tougher than Reid is on that point, but thank you.

24 I've got a request up here from the court reporter
25 that if any lawyers or anybody else in the room who has

1 commented has business cards, she would appreciate them.
2 So she can make sure to get the names right.

3 Anyone else?

4 KEVIN WASHBURN: Okay. We've got just a little more
5 time if anyone wants to make a comment. Anybody?

6 We do have a November 3 deadline. After multiple
7 extensions for our comment period, we have gotten a lot of
8 comments and while most of the comments that we received
9 here tonight have been from the tribe side, we have a lot
10 of written comments from industry and utilities and state
11 and local government types. So we're really grateful that
12 you all are weighing in because we do have a trust
13 responsibility to tribes and getting tribes comments is
14 imperative in crafting this rule well.

15 Your comments that we received tonight are really,
16 really useful. Steve and I and all of us thank you for
17 being very cogent and very surgical and very clear in your
18 comments, because that makes our job a lot easier. You've
19 given us good proposals, good ideas about how we might
20 amend the rule and we're really grateful for that. I'm
21 not sure what else we need to say.

22 We are moving forward. Mr. Rosier asked how quickly
23 we're going to get this rule done. Honestly, I can't
24 answer that at this point. Ultimately, the comment
25 deadline isn't even closed yet. We won't know until we

1 seen how many comments we've gotten and how long it takes
2 us to go through those comments in a very thorough way.
3 This man to my left is going to be working very hard once
4 that happens and Liz Appel over there, with our Regulatory
5 Affairs Office. We have a lot of work ahead of us. We've
6 got a very robust proposal, obviously. It has been very
7 carefully written, but we also need to very carefully
8 consider all the comments that we have received. You've
9 given us very interesting food for thought. Some very
10 good suggestions and some very interesting thoughts that
11 we need to carefully think through.

12 So we've got a little ways to go here, but this is
13 one of our highest priorities. Again, as I said earlier,
14 this isn't sexy, but it's very, very important to tribes.
15 We really appreciate how seriously you've taken this
16 process and how good the comments have been tonight. So
17 thank you for that. Is there anybody else who wishes to
18 say anything, or just extend our thanks. We take this
19 very seriously and we are so grateful that you've taken
20 this very seriously.

21 I'm impressed, it's nearly 8 o'clock and this is the
22 way you're choosing to spend your evening is with us
23 talking about Right-of-Way regs. So you've done your fair
24 share for Indian country this evening. I want to thank
25 all of you for that. This tribal consultation has come to

1 an end. Thank you.

2 (Tribal consultation ended at 7:52PM)

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CERTIFICATE OF COURT REPORTER

STATE OF GEORGIA:

COUNTY OF DEKALB:

I hereby certify that the foregoing meeting was reported as stated in the caption and the comments and the responses thereto were reduced to typewriting by me; that the foregoing pages, 3 through 61 represent a true, correct, and complete transcript of the meeting held on October 27, 2014, by the Bureau of Indian Affairs.

This the 6th day of November, 2014.

Roxanne E. Green
Certified Court Reporter
Georgia Certificate, 2795
Certified Verbatim Reporter, 5680

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